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August 24, 2021

Hon. Ann Marie Donio
United States Magistrate Judge
for the District of New Jersey
United States District Courthouse
4th & Cooper Streets
Camden, New Jersey 08101

By ECF & First Class Mail (Courtesy Copy)

Re: Estate of Gordon, et al v Wetzel, et al., 1:21-cv-04861 (NLH)
(AMD)

Dear Judge Donio,

Please accept this letter in reply to the State defendants' response to plaintiffs' motion to amend.

We strenuously object to the State defendants' self-pronounced 'reservation of rights' "to withdraw the pending Motion to Dismiss, * * * and file one that addresses all counts, including the new ones."

We conceive of this to be slyly intended as a vehicle to extend the discovery stay they seek to impose pending resolution of their dismissal motion by extending a resolution date even further into the future through withdrawing and re-filing such a motion.

Inasmuch as we believe plaintiffs' proposed amendment does not trespass on the viability or bases of these defendants' pending motion under Rule 12 - and the State defendants have not claimed otherwise - we find no reason other than strategy for this 'reservation.'

Were the State defendants contemplating a Rule 12 challenge to the amendment proposed, now was the time to have brought it by opposing plaintiffs' motion to amend on grounds of futility.

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Among the grounds that could justify a denial of leave to amend are undue delay, bad faith, dilatory motive, prejudice, and futility. "Futility" means that the complaint, as amended, would fail to state a claim upon which relief could be granted. [In re Burlington Coat Factory Securities Litigation], 114 F.3d [1410] at 1434 [3rd Cir. 1997]). In assessing "futility," the District Court applies the same standard of legal sufficiency as applies under Rule 12(b)(6). *Id.*; 3 Moore's Federal Practice, *supra* § 15.15[3], at 15-47 to -48 (3d ed.2000).

Shane v. Fauver, 213 F.3d 113, 115 [3rd Cir. 2000] [some citations and internal quotations omitted]; see also e.g., Massarsky v. Gen. Motors. Corp., 706 F.2d 111, 125 [3d Cir.1983] [trial court may properly deny leave to amend where amendment would not withstand motion to dismiss])

The State defendants have not timely brought a futility challenge to plaintiffs' proposed amendment and, we submit, should now be deemed to have waived a substantively identical challenge, albeit brought in a dilatory manner, as a result.

As always, thank you for your courtesies and kind attention.

Respectfully,

/s/ Neal Wiesner

Neal Wiesner

cc: All counsel of record (via CM/ECF)